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IN THE

Supreme Court of the United States

METRO-GOLDWYN-MAYER STUDIOS, INC., *et al.*,
Petitioners,

v.

GROKSTER, LTD., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR *AMICUS CURIAE* THE INTELLECTUAL PROPERTY OWNERS ASSOCIATION IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae Intellectual Property Owners Association ("IPO") is a nonprofit, national organization of more than 150 companies and nearly 200 inventors, authors, executives, and attorneys who own or are interested in patents, trademarks, copyrights, and other

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[1] The parties have consented to the filing of this brief *amicus curiae*. The letters of consent have been filed with the Clerk of the Court. In accordance with Supreme Court Rule 37.6, *amicus curiae* states that this brief was not authored, in whole or in part, by counsel to a party, and that no monetary contribution to the preparation or submission of this brief was made by any person or entity other than the *amicus curiae* or its counsel.

intellectual property rights. Founded in 1972, IPO represents the interests of all owners of intellectual property. The members of IPO's Board of Directors, which approved the filing of this brief, are listed in the Appendix.[2]

IPO's interest in this case derives from several concerns. First, the widespread infringement that currently results from using respondents' products threatens not only the value of petitioners' creative property, but also the integrity of copyright law itself. The constitutional promise of security to authors for their works lacks substance if the law cannot effectively address new technologies promoted to enable infringement.

Second, IPO believes that the problem faced by petitioners can be addressed through the concept of inducement, an aspect of contributory copyright infringement that the Ninth Circuit failed to consider.

Third, IPO wants to preserve the patent law doctrine of contributory infringement from unintended effects of a decision in this case. Because the Court in *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984) relied in part on the patent law standard for contributory infringement to inform the copyright rule on secondary liability, any re-examination of the copyright rule could indirectly affect patent law. The patent doctrine of contributory infringement, expressed in 35 U.S.C. § 271(c), draws the right line between those who make infringement inevitable by supplying a purpose-made component, and those who sell products that are capable of substantial non-infringing uses.

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[2] General Electric Co., which owns a majority interest in one of the petitioners and is represented on the IPO Board of Directors, did not participate in the preparation of or vote on whether to file this brief.

IPO submits this brief not to support the position of either party, but to urge that the doctrine of active inducement be applied to petitioners' claim for copyright infringement. If this approach is adopted, the opinion of the Ninth Circuit should be vacated and the case remanded to the district court for reconsideration of its summary judgment ruling.

INTRODUCTION

Creators of copyrighted works need the assurance of effective remedies to prevent wholesale misappropriation of their property. And creators of distribution technologies need reasonably predictable standards of liability for unlawful uses of their products. This case presents an opportunity for the Court to articulate a balance between these interests that will best serve the constitutional and statutory objectives of copyright law.

Advances in digital technology have enabled petitioners to expand their business with products like compact discs, DVDs, and video-on-demand to the home. The nature of digital content distribution, however, creates new insecurities for rights owners. Robust communication systems like the Internet make it possible for illegal copies to proliferate at breathtaking speed. Moreover, in contrast to the analog world, every digital copy is perfect. As a result, copyright infringement has emerged as an irresistible pastime for many, and a business opportunity for some.

At the same time, the Internet in general, and peer-to-peer file-sharing software in particular, serve important and completely legitimate objectives. As the record cited by the Ninth Circuit demonstrates, some musicians freely distribute their songs over the Internet as a means of gaining recognition outside the established channels of the music business. Presumably the same is true of some

independent filmmakers, and as the means of producing "professional" audio and video content become cheaper we can expect this demand to increase. Indeed, as we look to the future of information exchange, in which the public domain content of thousands of libraries may become available on line,[3] we can readily appreciate the public interest in effective peer-to-peer file-sharing systems.

Therefore, this case calls for a rule that will discourage the development of tools designed and marketed to facilitate copyright infringement, while preserving the incentive to innovate in distribution technologies, the use of which may change over time. The tried and proven doctrine of inducement provides such a rule.

SUMMARY OF ARGUMENT

Copyright law imposes responsibility for another's infringement through doctrines of vicarious liability and contributory infringement. One aspect of contributory infringement is inducement. Just as it did in *Sony*, the Court should again look to the patent law to inform interpretation of copyright principles. Codified in 35 U.S.C. § 271(b), inducement applies where the supplied product, even if useful for some non-infringing purposes, has been actively promoted as an aid to infringement. In the copyright context, because the necessary element of intent may be proved by circumstantial evidence, inducement can capture those whose obvious aim is to abet illegal reproduction and distribution, leaving unaffected the honest innovator of content distribution systems.

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[3] See report of Oxford University's agreement with Google for "digitisation" of over one million public-domain reference works from the Bodleian Library, at htty://www.bodley.ox.ac.uk/news/news58.htm (visited January 18, 2005).

The Court ruled in *Sony* that secondary liability may not result from merely providing a staple article of commerce – that is, a product capable of substantial non-infringing uses. That ruling drew from patent law, which places important reliance on the clearly defined protection of the staple article of commerce doctrine. The Court's ruling in this case should confirm that a staple article embraces potential uses, and that the *Sony* standard is met by a use that is non-trivial. Because the case can be resolved through the doctrine of inducement, there is no need to reconsider the definition of a staple article of commerce.

ARGUMENT

I. THE NINTH CIRCUIT ERRED IN FAILING TO APPLY THE DOCTRINE OF ACTIVE INDUCEMENT WHICH EXISTS IN COPYRIGHT LAW AND SHOULD BE INFORMED BY PATENT LAW

Secondary liability for copyright infringement comprises two basic theories: vicarious liability, which focuses on the nature of the relationship between the primary and secondary infringer; and contributory infringement, which focuses on the behavior of the secondary infringer. Vicarious liability was described in *Gershwin Publishing Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2nd Cir. 1971). There, the court referred to *Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co.*, 36 F.2d 354 (7th Cir. 1929), in which a dance hall had hired an orchestra to play what turned out to be copyrighted music. In such a case, the dance hall owner was a "vicarious" infringer, even absent actual knowledge of the infringement. The court explained that "although vicarious liability was initially predicated upon the agency

doctrine of respondeat superior . . . , one may be vicariously liable if he has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities." 443 F.2d at 1162.

The *Gershwin* court also described the companion concept of a "contributory" infringer who "with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another". *Id.* As an example, it cited the case of *Screen Gems-Columbia Music, Inc. v. Mark Fi Records, Inc.*, 256 F. Supp. 399 (S.D.N.Y. 1966), in which an advertising agency and radio station were held liable for advertisements promoting infringing records. Thus, by this time, inducement was recognized as an aspect of contributory copyright infringement.

In *Sony*, the Court found no occasion to consider application of inducement, because there was no evidence of any contact between Sony and the users of its video recorder, other than its sale.[4] Instead, the Court characterized the copyright owners' claim as unprecedented, based as it was on the sole act of providing a device that could be used for both infringing and non-infringing purposes. 464 U.S. at 439. Considering the related patent law on contributory infringement, and the staple article of commerce doctrine, the Court concluded that such a claim would not lie where the device was

[4] "The only contact between Sony and the users of the Betamax that is disclosed by this record occurred at the moment of sale. The District Court . . . found that 'there was no evidence that any of the copies made by Griffiths or the other individual witnesses in this suit were influenced or encouraged by [Sony's] advertisements.' . . . Sony certainly does not 'intentionally induce[]' its customers to make infringing uses of respondents' copyrights . . . ." 464 U.S. at 438-439, n.19.

"capable of substantial noninfringing uses." 464 U.S. at 440-442.

Much has since been written about the *Sony* decision, some of it confusing because of labels. "Contributory" infringement is sometimes used as another term for vicarious liability, or as a separate term that includes inducement, or as a matter distinct from inducement. For clarity, we will use "vicarious liability" to refer to relationship-based theories of secondary liability, and "contributory infringement" to refer to behavior-based theories. Thus, in the second category falls the act of merely providing an enabling device, which *Sony* teaches is not actionable if the device is a staple article. However, the second category also embraces inducement.

As the record of this case demonstrates, vicarious liability is not well suited to deal with the introduction of new dual-use technologies. The doctrine draws on principles of respondeat superior, and control becomes a central issue. Where new technologies are involved, there is a danger that a narrow and benign technical control of the sort common to any network will be employed to expose the developer to liability, thereby chilling innovation.[5] Moreover, the issue can be manipulated by

[5] *See* Statement of Andrew Greenberg, Vice Chairman, Intellectual Property Committee, IEEE-USA, before the Senate Comm. On the Judiciary, 108th Cong. (July 22, 2004), at http://judiciary.senate.gov/testimony.cfm?id=1276&wit_id=3751 (visited January 18, 2005) ("[A] capacity to control can be inferred from almost any networked distribution technology involving a centralized server. Even software that is not networked, but regularly and routinely updated by users with new versions can have an imputed degree of control from the failure to add limiting features between such new versions. The difficulty with permitting mere capacity to control to be the predicate for liability is that it potentially exposes vendors of virtually every new technology converging with a network to the claim

the defendant who can achieve its business objective of profiting from copyright infringement by designing its system to avoid control. Indeed, such apparent behavior by respondents was cited by petitioners but rejected by the Ninth Circuit as insufficient to satisfy the requirements of vicarious liability. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154, 1165-1166 (9th Cir. 2004).

In contrast, the law of inducement provides a sound rule of decision with respect to new "infringement-neutral" technologies that both (1) enable the legal distribution of works (whether copyrighted or in the public domain) and thereby "promote the Progress of Science and useful Arts" as envisioned by the Founders, and also (2) enable the illegal distribution of copyrighted works without the permission of the copyright holder. The Ninth Circuit's failure to consider it, even as it quoted from *Gershwin*, lends weight to the Register of Copyright's observation that inducement is a relatively neglected aspect of contributory copyright infringement.[6] And because there are few cases explaining its application to copyright, one should turn to patent law, as the Court did in *Sony*.

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that it has failed to satisfy . . . each and every owner of copyrighted content [because of the vendor's] failure to modify the technology to his satisfaction. [T]he potential chilling impact of this test on innovation is significant.").

[6] *See* Statement of the Honorable Marybeth Peters, Register of Copyrights, before the Senate Comm. On the Judiciary, 108th Cong. (July 22, 2004) http://judiciary.senate.gov/testimony.cfm?id=1276&wit_id=307 (visited January 18, 2005) ("[T]he common formulation of contributory infringement includes a reference to those who 'induce' another to commit infringement . . . . When actually applying this standard, however, the courts have not focused on the inducement aspect of contributory infringement . . . .").

Codified in 35 U.S.C. § 271(b), the doctrine treats as an infringer anyone who "actively induces infringement." Although the statute does not speak in terms of intent, the Federal Circuit has held that intent is a required element of inducement. *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 909 F.2d 1464, 1469 (Fed. Cir. 1990). Indeed, Judge Giles Rich, an author of the 1952 Patent Act and of the *Hewlett-Packard* opinion, contrasted inducement with the closely related doctrine of "contributory infringement", which had been separately defined by the Act and which presumed intent "because the [contributed] component had no substantial non-infringing use." *Id.*

Active inducement respects the competing interests of technology developers and authors. It requires the plaintiff to prove some objective action by the supplier that encourages infringement, *Warner-Lambert Co. v. Apotex Corp.*, 316 F.3d 1348, 1364 (Fed. Cir. 2003) ("promote or encourage"), providing a safe harbor to the honest developer of infringement-neutral distribution systems.[7] And its subjective prong of intent can be satisfied with circumstantial evidence. *Water Techs. Corp. v. Calco, Ltd.*, 850 F.2d 660, 668 (Fed. Cir. 1988) (noting that control over the customer's use of the enabling product was a relevant factor).[8] Perhaps most significantly for authors,

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[7] It is not helpful, and may be dangerous, to address the wrong as "turning a blind eye" to infringement. *Cf. Grokster*, 380 F.3d at 1166. That phrase may be a proper rhetorical device when considering the intent prong of inducement, but should not be used to conflate it with the requirement for objectively promotional behavior, into a rule based solely on the state of mind of the supplier or the enabling effect of the technology. Such a result would certainly have a chilling effect on legitimate innovation.

[8] Thus, in the case at bar, the facts that the Ninth Circuit found insufficient to raise a claim for vicarious liability -- including alleged termination of or failure to implement filters to block unlawful sharing -- may be considered anew for their relevance to the ultimate question

inducement can be found even if the product is capable of a substantial non-infringing use. *Hilgraeve Corp. v. Symantec Corp.*, 265 F.3d 1336, 1343 (Fed. Cir. 2001).[9]

The Ninth Circuit erred in failing to consider the inducement doctrine as an aspect of contributory copyright infringement. According to petitioners, evidence exists to demonstrate that "respondents brazenly encourage and profit from infringement."[10] If this is true, then on remand the district court should consider such evidence and determine whether petitioners have raised material fact issues demonstrating that respondents (1) acted to encourage or promote infringement and (2) intended that infringing acts result.

II. THE ESTABLISHED DOCTRINE OF CONTRIBUTORY INFRINGEMENT, WHICH EXEMPTS PRODUCTS CAPABLE OF A SUBSTANTIAL NON-INFRINGING USE, SHOULD NOT BE DISTURBED

In *Sony*, the Court addressed a new reproduction technology – home video tape recording – that both

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of intent to induce infringement. Indeed, a defendant's denials, and even instructions to its customers not to infringe, may not be enough to avoid a finding of intent inferred from substantial contrary evidence. *See*, e.g., *Lifescan, Inc. v. Can-Am Care Corp.*, 859 F. Supp. 392, 396 (N.D. Cal. 1994) ("The fact that Can-Am provides the warning to consumers does not equate with the fact that the consumers, in fact, understand and heed the warning.").

[9] *See* also *Fromberg, Inc. v. Thornhill*, 315 F.2d 407, 412 (5th Cir. 1963) ("Without regard . . . to the separate question involved in the 271(c) contributory infringement phase whether this was a staple product capable of other uses, the sales pitch for the Miracle Plug was obvious . . . ."); Chisum on Patents § 17.04[3] n.9, citing district court cases.

[10] Petition for a Writ of Certiorari, p. 3.

promised a new way to distribute content and threatened content owners' exclusive control over it. As already noted, however, the facts could not support an inducement claim, and the copyright holders relied on the "provisioning" aspect of contributory infringement: the mere supplying of a dual-use device. The Court observed that the

> staple article of commerce doctrine must strike a balance between a copyright holder's legitimate demand for effective – not merely symbolic – protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce. Accordingly, the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed it need merely be capable of substantial noninfringing uses.
>
> The question is thus whether the Betamax is capable of commercially significant noninfringing uses. In order to resolve that question, we need not explore *all* the different potential uses . . . .
>
> 464 U.S. at 442 (emphasis in original).

In arriving at this balanced view of contributory infringement, the Court drew from long-established principles of patent law, codified in 35 U.S.C. § 271(c). In return, patent law has since looked to the *Sony* opinion as authoritative on the boundaries of the staple article of commerce doctrine. See, for example, *Dynacore Holdings Corp. v. U.S. Philips Corp.*, 363 F.3d 1263, 1275 (Fed. Cir.

2004).[11] In effect, from IPO's perspective, the patent community has embraced what it sees as key aspects of the Court's formulation. First, the article need merely be "capable" of a noninfringing use, or, to put it another way, it may have "potential" noninfringing uses. This definition pays respect to the fact that one cannot predict with certainty how end-users will employ a device, or how that use may change with time. Second, one does not need to weigh all possibly lawful and unlawful uses to arrive at a ratio; instead, a single noninfringing use will suffice if it is "substantial".

This does not mean that comparing infringing to noninfringing uses is never relevant to secondary liability for copyright infringement. It may be relevant on the issue of intent, the second prong of active inducement, since the supplier's knowledge of widespread illegal use may be probative of its intent to cause infringing acts. Therefore, the observation of Judge Posner in *In re Aimster Copyright Litigation*, 334 F.3d 643, 649 (7th Cir. 2003) that "some estimate of the magnitude of these uses is necessary for a finding of contributory infringement" may be apt, but only in the case where the supplier has actively encouraged infringement and the court is considering the claim as one for inducement.

In common parlance, the word "substantial" means "not imaginary or illusory". Webster's Ninth Collegiate Dictionary. This is consistent with patent jurisprudence,

[11] The cited opinion provides an example of potentially confusing terminology. The Federal Circuit refers to the "*Sony* standard for vicarious infringement liability, which the Supreme Court imported into copyright law . . . ." 363 F.3d at 1275. Of course, the court was referring not to vicarious liability of the sort discussed by the Ninth Circuit in *Grokster*, but to the generic notion of secondary liability, which covers the species of contributory infringement and the sub-species of contribution by merely providing a staple article.

where it is taken to mean "not farfetched, illusory, impractical or merely experimental." Chisum on Patents § 17.03[3], n.8. Similarly, the term "significant" is defined by Webster's as "having meaning"; "of a noticeably or measurably large amount"; "probably caused by something other than mere chance".

Thus, it is no surprise that we also see a nonstaple article referred to as having "no commercial use" except to enable infringement. *Dawson Chem. Co. v. Rohm and Haas Co.*, 448 U.S. 176, 184 (1980). But the distinction between a staple and nonstaple article is relevant beyond the doctrine of contributory infringement; the related patent doctrines of exhaustion and implied license also rely on this time-tested definition to determine the existence of important rights. See, for example, *United States v. Univis Lens Co.*, 316 U.S. 241, 249 (1942); and *Met-Coil Sys. Corp. v. Korners Unlimited, Inc.*, 803 F.2d 684, 687 (Fed. Cir. 1986). In the patent law, the meaning of a staple article is well settled, and comports with this Court's statement in *Sony*.

Because the problem of widespread copyright infringement by file sharing can be addressed through application of the inducement doctrine, it is unnecessary to revisit *Sony*'s formulation and try to stretch contributory infringement – of the provisioning sort – to fit. More importantly, it would be unwise to do so. To recast the standard so that a staple article must be "primarily" used for noninfringing purposes, or that only actual rather than potential uses be considered, would profoundly change both patent and copyright law.

The staple article of commerce doctrine provides a necessary safe harbor for developers of technology who require predictability in order to preserve their businesses in the face of potential litigation, and this is particularly so

where the uses of products can change rapidly and unpredictably. The doctrine should not be disturbed, and need not be in this case, where inducement provides the appropriate rule for decision.

CONCLUSION

The unprecedented scope of current infringement of petitioners' works results from powerful new technologies that link Internet users for easy transfer of information. Copyright law must meet the challenge of providing a meaningful remedy against those who promote the use of this technology to accomplish infringement, while protecting legitimate uses of the Internet, now and in the future. The constitutional imperative to "promote the Progress of Science and useful Arts" requires a balanced approach to this problem, and the doctrine of active inducement provides the best solution. IPO respectfully submits that the Court should vacate the decision of the Ninth Circuit and remand for reconsideration by the district court.

Respectfully submitted,

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